

**Court of Appeals, State of Michigan**

**ORDER**

Randy H Bernstein v Seyburn Kahn Ginn Bess & Serlin PC

Docket No. 299184

LC No. 2008-096538 NM

Karen M. Fort Hood  
Presiding Judge

Joel P. Hoekstra

Patrick M. Meter  
Judges

---

The Court orders that the October 25, 2011 opinion in this matter is hereby AMENDED to reflect that Kenneth Poss, D.P.M and Foot & Ankle Health Centers, P.C. are not appellees in this appeal. These parties have been deleted from this Court's register of actions and the caption of the opinion.

In all other respects, the October 25, 2011 opinion remains unchanged.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

NOV 18 2011

Date

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

RANDY H. BERNSTEIN, D.P.M.,

Plaintiff-Appellant,

v

SEYBURN KAHN GINN BESS & SERLIN, P.C.,  
and BARRY R. BESS,

Defendants-Appellees,

and

KENNETH POSS, D.P.M., and FOOT & ANKLE  
HEALTH CENTERS, P.C.,

Appellees.

---

UNPUBLISHED

October 25, 2011

No. 299184

Oakland Circuit Court

LC No. 2008-096538-NM

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Plaintiff Randy Bernstein, D.P.M., appeals by leave granted the trial court's order denying his motion to prevent defendant Barry Bess and his law firm, defendant Seyburn, Kahn, Ginn, Bess and Serlin, P.C. (Seyburn, Kahn) from asserting the attorney-client privilege at depositions. We reverse and remand.

Kenneth Poss, a doctor of podiatric medicine, employed Bernstein as a podiatrist. After October 1990, when Poss was convicted of health care fraud, which resulted in the suspension of his medical license until 1992, Poss proposed a new business venture to Bernstein. Bernstein would be the sole shareholder of a new business where he would provide podiatry services and Poss would provide management and administrative assistance and they would split the profits equally. Bernstein agreed to the proposal. Poss had a previous relationship with Bess and Seyburn, Kahn and recommended that Bernstein retain Bess to incorporate Foot Health Centers P.C. (FHC). Bernstein followed the recommendation. Bess prepared and filed the appropriate paperwork, which resulted in FHC being incorporated on August 15, 1991.

In December 1998, Bess, at the direction of Poss, filed articles of incorporation for Foot & Ankle Health Centers, P.C. (FAHC). Shortly after FAHC was incorporated, Bess apparently filed documents to dissolve FHC. Poss was listed as the sole director of FAHC, but Bernstein

was named as a shareholder and the vice president. According to Bernstein, until June 2006, when he began negotiating to end his business relationships with Poss, he believed that he was a 50 percent shareholder in FAHC. At that time, Bernstein learned that he was only a two percent shareholder in FAHC.

Upon realization that he was only a two percent shareholder in FAHC, Bernstein sued defendants Bess and Seyburn, Kahn for legal malpractice and breach of fiduciary duty committed during the course of their representation of Bernstein. Specifically, Bernstein alleged that Bess and Seyburn, Kahn assisted Poss in fraudulently converting Bernstein's 100 percent interest in FHC into a two percent interest in FAHC. In anticipation of deposing Bess, Bernstein moved the trial court for an order preventing Bess and Seyburn, Kahn from claiming attorney-client privilege. The trial court denied the request, holding that there was "an attorney-client privilege between Bess and Seyburn, Kahn and the corporations" and therefore it could not prohibit Bess and Seyburn, Kahn from claiming privilege at depositions.

On appeal, Bernstein recognizes that the attorney-client privilege belongs to the corporation. But he argues that because he is a shareholder and an officer of FAHC, the privilege does not prevent disclosure to him. Bernstein also argues that the crime-fraud exception to the attorney-client privilege prohibits Bess and Seyburn, Kahn from invoking the privilege.

"Whether the attorney-client privilege applies to a communication is a question of law that we review de novo." *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 484; 691 NW2d 50 (2004). Once this Court determines whether the privilege applies, it considers whether the trial court's order was proper or an abuse of discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998). An abuse of discretion occurs when the trial court's order falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The reasons supporting the attorney-client privilege—"the centrality of open client and attorney communication to the proper functioning of our adversary system of justice"—cease to operate when the attorney provides advice about future wrongdoing. *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994), quoting *United States v Zolin*, 491 US 554, 562-563; 109 S Ct 2619; 105 L Ed 2d 469 (1989). The exception prevents clients from using the privilege to shield their bad acts. *People v Van Alstine*, 57 Mich 69, 79; 23 NW 594 (1885).

Initially, we reject Bess and Seyburn, Kahn's argument that Bernstein cannot invoke the crime-fraud exception to the attorney client privilege because Bernstein failed to plead with particularity the applicable circumstances. In making this claim, Bess and Seyburn, Kahn rely on MCR 2.112(B)(1), which requires that when pleading fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. Bess and Seyburn, Kahn argue that Bernstein did not plead a claim of fraud; rather, he pleaded claims of legal malpractice and breach of fiduciary duty. Consequently, Bess and Seyburn, Kahn maintain that because Bernstein did not plead fraud with particularity, Bernstein cannot rely on the crime-fraud exception to defeat Bess and Seyburn, Kahn's reliance on the attorney-client privilege. We find this argument unavailing because Bernstein asserted the crime-fraud exception when he moved the trial court to hold that Bess and Seyburn, Kahn could not invoke the attorney-client privilege

at depositions. In a motion, a party “is not required to comply with the strict pleading requirements of MCR 2.112(B)(1).” *Rapaport v Rapaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990). Rather, motions are governed by MCR 2.119. *Id.* Accordingly, the crime-fraud exception may be applied to defeat the attorney-client privilege because Bernstein asserted the exception in a motion.

In regard to whether the crime-fraud exception applies in this case, we conclude that *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509; 309 NW2d 645 (1981), governs. In *Fassihi*, the plaintiff, a radiologist, was asked by Dr. Lopez to join him in the practice of radiology at St. Mary’s Hospital. The two doctors formed a professional corporation, in which they each owned 50 percent of the stock, were the only two board members, and were employees. The two doctors practiced radiology together for 18 months, when Dr. Lopez decided that he no longer wanted to be associated with the plaintiff. Dr. Lopez asked the defendant, the attorney for the professional corporation, to ascertain how the plaintiff could be ousted from the corporation. The plaintiff soon received a letter that terminated his interest in the professional corporation. Further, because he was no longer a member of the corporation and because Dr. Lopez had an agreement with St. Mary’s Hospital that gave him sole responsibility for staffing the radiology department, and the agreement required membership in the professional corporation, the plaintiff was no longer eligible to practice at St. Mary’s Hospital. The defendant had been responsible for drafting all documents pertaining to the professional corporation, and it had knowledge of Dr. Lopez’s agreement with St. Mary’s Hospital. The defendant never disclosed the agreement to the plaintiff. The plaintiff sued the defendant for legal malpractice, and breach of fiduciary, legal, and ethical duties. On appeal, this Court held that the defendant could not invoke the attorney-client privilege to refuse to answer questions regarding the ouster of the plaintiff from the professional corporation, as the communications were for the purpose of perpetrating a fraud. *Id.* at 519. It explained:

[D]efendant acknowledges that the attorney-client privilege does not protect communications made for the purpose of perpetrating a fraud. Although plaintiff’s complaint does not use the magic word “fraud”, the gist of his complaint rests on a species of fraud. Plaintiff asserts that defendant, while under the guise of representing the corporation, conspired to withhold information from him which he had a right to have as a 50% shareholder and member of the board of directors and to wrongfully deprive him of the benefits of a business opportunity. These allegations were sufficient to defeat the invocation of the attorney-client relationship pursuant to the fraud exception. [*Id.* at 519 (citation omitted).]

Thus, in *Fassihi*, the plaintiff alleged that the defendant and Dr. Lopez worked together to wrongfully deprive him of a business opportunity. Under those circumstances, this Court concluded that because the plaintiff alleged facts sufficient to demonstrate that the defendant conspired to withhold information from him and to deprive him of the benefits of a business opportunity, the defendant could not invoke the attorney-client privilege because the fraud exception applied.

Here, similar to *Fassihi*, Bernstein alleged that Bess failed to disclose relevant information about the purpose of FAHC, and that Bess assisted Poss in fraudulently converting

Bernstein's interest in the corporation. Bernstein alleged that Bess and Poss failed to explain to him that FAHC was being formed for the purpose of conducting business operations, and instead indicated that the name was being changed due to Bernstein's recent board certification in ankle surgery. Thus, Bernstein alleged that Bess created FAHC without disclosing to Bernstein its true purpose, failed to provide him with stock certificates, financial information, business records, or any other relevant information for FAHC, and enabled Poss to convert what Bernstein believed to be a 50 percent interest in the corporation to a two percent interest. Under these circumstances, we hold that the trial court erred when it found Bess and Seyburn, Kahn could invoke the attorney-client privilege because Bernstein has alleged facts such that the fraud exception prevents the use of the attorney-client privilege by Bess and Seyburn, Kahn in this case. *Id.*

Because we find that the crime-fraud exception to the attorney-client privilege applies to the communications between Poss, Bess and Seyburn, Kahn, we need not decide whether the attorney-client privilege can be asserted against Bernstein.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter